Public Knowledge

January 12, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: WT Docket No. 12-4, Proposed Assignment of Licenses to Verizon Wireless from SpectrumCo and Cox TMI Wireless

Dear Ms. Dortch:

On January 11th, John Bergmayer and Jodie Griffin, attorneys for Public Knowledge (PK), spoke to Jim Bird, Neil Dellar, Virginia Metallo, and Joel Rabinovitz from the Office of General Counsel's Transaction Team, and Kathy Harris from the Wireless Bureau. PK argued that the Commission should establish a procedure to allow parties to challenge the designation of confidential data in this proceeding, and that it should clarify the legal standard for the designation of materials.

Legal Standard

The Commission should clarify that all data for which confidential (or "highly confidential") treatment is sought must be commercially sensitive.

The Commission allows submitting parties to request "confidential" treatment for material "that is subject to protection under FOIA and the Commission's implementing rules."[1] Many advocates PK has spoken to believe that, if material would fall within a Freedom of Information Act (FOIA)[2] exemption, then a submitting party may claim confidential treatment for it. However, the Commission's rules that allow for parties to request non-public treatment for material do not simply restate a FOIA exemption. FOIA does not prevent an agency from releasing information that falls within an exemption, and rather than merely allowing parties to designate material that falls within exemption four ("trade secrets and commercial or financial information obtained from a person and privileged or confidential"),[3] the Commission's implementing rules set a higher bar: if material is of the kind that "would customarily be guarded from competitors,"[4] submitting parties may claim confidentiality for it if they can explain how their materials, if disclosed, could cause them "substantial competitive harm," among other things.[5] In other words, it is not enough that designated information be "confidential," as many internal company materials and communications routinely are. Rather, submitting parties much

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[1] WT 11-65, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, *Protective Order* (April 14, 2011) ¶ 2. The Commission's standard for "Highly Confidential Information" is clearer. WT 11-65, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, *Second Protective Order* (April 27, 2011) ¶ 2.

[2] 5 U.S.C. § 552.

[3] 5 U.S.C. § 552(b)(4).

[4] 47 C.F.R. § 0.457(d)(2).

[5] 47 C.F.R. § 0.459(b)(5). The Commission also provides a list of materials that it presumes already meet these criteria. 47 C.F.R. § 0.457(d)(1).

show how particular material is competitively sensitive and could cause them marketplace harms if used by a competitor.

It would be helpful if the Commission clarified the precise standard embodied in its various implementing rules, so that reviewing parties can more simply ascertain whether given material is properly designated.[6]

Challenge Procedures

In the AT&T/T-Mobile proceeding, the Commission established procedures for parties to submit and review confidential information. However, no clear procedure was established for a reviewing party to challenge the confidential designation of materials. AT&T thus was able to designate materials that did not meet the substantive standards for confidential treatment, preventing PK and others from discussing this material in public or semi-public forums (*e.g.*, mailing lists), or sharing this material with members of Congress and other policymakers, academics, members of the public, or outside consultants who had not signed the protective orders (and would be unlikely ever to do so). By adopting procedures in this matter to allow for speedy challenges to improper confidential designation, the Commission will prevent these harms from occurring again.

While there is no bar to a party informally raising any number of issues in a proceeding, including challenging the designation of material, all parties would benefit from a clearer procedure. The existing process for adjudicating disputes about whether a given person is a "competitive decision-maker" is a good starting point, but a few additions would make it more helpful to reviewing parties—in particular, the Commission should adopt a timeline, and spell out who bears the burden of proof. PK envisions that a challenging party would file a brief statement describing why particular documents or portions of documents do not merit confidential (or highly confidential) treatment. The submitting party would have no more than one week to respond, bearing the burden of showing how particular materials meet confidentiality standards (or conceding that they do not). Within a week of its response the Bureau chief would issue a decision (or request further pleadings). In the event of an adverse decision, a submitting party would have two days to decide whether to appeal the Bureau decision to the full Commission; if it does not, then the materials would be re-designated.

These procedures unlikely to be a significant burden on the Commission, since they are primarily a safeguard—their very existence would serve to make submitting parties more selective in the data they designate as confidential. In any event, they would be more streamlined than a formal FOIA request, which is significantly more burdensome to the Commission as well as less useful for reviewing parties—while at the same time carrying more risk to submitting parties.[7]

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[6] The Commission's recent description of the standard for "highly confidential information" is much more detailed than the standard for confidential information, and could serve as a model.

[7] Following the procedure described in 47 C.F.R. § 0.461, a party may be able to make a request for confidential materials under FOIA and obtain them outside of a protective order. However, this approach has several flaws. For example, it does not cure the improper designation of materials for the purposes of the proceeding and raises doubt as to how parties may use materials that have been made public in a parallel matter. Additionally, in a FOIA context, the FCC has adopted a rule that provides that it may release *any* confidential materials if the circumstances call for

Respectfully submitted,

/s John Bergmayer
Senior Staff Attorney
PUBLIC KNOWLEDGE

it. *See* 47 C.F.R. § 0.461(f)(4). Thus, from a submitting party's perspective, a FOIA proceeding carries the risk that its bona fide confidential materials, such as trade secrets, may be released.